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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-454

MOORMAN MANUFACTURING COMPANY,

Appellant,

vs.

G. D. BAIR, DIRECTOR OF REVENUE
STATE OF IOWA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IOWA

MOTION TO DISMISS

RICHARD C. TURNER
Attorney General of Iowa

HARRY M. GRIGER
Assistant Attorney General
Lucas State Office Building
Des Moines, Iowa 50319

ATTORNEYS FOR APPELLEE

INDEX

	Page
TABLE OF CITATIONS	
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	7
CONCLUSION	18

CITATIONS

CASES

	Page
Bass, Ratcliff & Gretton Ltd. v. State Tax Commission, 266 U.S. 271 (1924)	8,11
Butler Bros. v. McColgan, 315 U.S. 501 (1942)	8,9,12
Complete Auto Transit, Inc. v. Brady, 97 S. Ct. 1076 (1977)	16
Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939)	8,9,12
General Motors Corporation v. District of Columbia, 380 U.S. 553 (1965)	5,6,9,11,15
Han Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1930)	8
International Harvestor Co. v. Evatt, 329 U.S. 416 (1947)	8,12
Kent-Coffey Mfg. Co. v. Maxwell, 291 U.S. 642 (1933)	8

National Leather Co. v. Massachusetts, 277 U.S. 413 (1928) 8

Norfolk & Western Railway Co. v. Missouri Tax Commission, 390 U.S. 317 (1968) 9,16

Norfolk & Western Railway Co. v. North Carolina, 297 U.S. 682 (1936) 8,12

Northwestern States Portland Cement Company v. Minnesota, 358, U.S. 450 (1959) 10

Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975) 16

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 8,9,11

United States v. Raines, 362 U.S. 17 (1960) 10

Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) . . 9,13,16

Zucht v. King, 260 U.S. 174 (1922) 7

CONSTITUTIONAL PROVISIONS AND STATUTES

Page

Constitution of the United States of America, Article I, Section 8, Clause 3 (Commerce clause) 1

Constitution of the United States of America, Amendment XIV (Due Process clause) 1

Constitution of the United States of America, Amendment XIV (Equal Protection clause) 1

U.S. Stat. 929, 28 U.S.C. § 1257(2) 2,7

Section 422.33(1)(b), Code of Iowa, 1975 1,2,7

Section 422.35, Code of Iowa, 1975 14

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MOTION TO DISMISS

Appellee (Director) hereby makes a Motion to Dismiss this appeal of Appellant (Moorman) pursuant to United States Supreme Court Rule 16 for want of substantial federal questions and because the single sales factor apportionment formula contained in § 422.33(1)(b), Code of Iowa, 1975, does not violate the Constitution of the United States of America, Article I, Section 8, Clause 3 (Commerce clause), Constitution of the United States of America, Amendment XIV (Due Process clause), and Constitution of the United States of America, Amendment XIV (Equal Protection clause), either on its face or as applied to Moorman's net income.

OPINIONS BELOW

Copies of the opinions of the trial court are appended to Moorman's Jurisdictional Statement. The opinion of the Iowa Supreme Court entered on May 25, 1977, is reported at 254 N.W.2d 737 (1977). Copies of that opinion and order denying Moorman's petition for rehearing are appended to the Jurisdictional Statement.

JURISDICTION

Moorman invokes the jurisdiction of this court under 28 U.S.C. § 1257(2) since the Iowa Supreme Court held that the Iowa net income tax apportionment formula contained in § 422.33(1)(b), Code of Iowa, 1975, for reasonably attributing to Iowa a portion of Moorman's unitary net income derived from the manufacture or sale of tangible personal property by the ratio which gross sales made within Iowa bear to total gross sales, did not, on its face or as applied to Moorman's net income, violate the commerce clause and Due Process and Equal Protection clauses of the United States Constitution.

QUESTIONS PRESENTED

Whether the single-factor destination sales formula for the apportionment of net income prescribed by the Iowa income tax statute: (1) discriminates against interstate commerce through the device of multiple state taxation; (2) subjects to Iowa tax a corporation's income out of all reasonable proportion to the business transacted in Iowa; (3) constitutes the extraterritorial taxation of income; and (4) subsidizes exports and imposes a tariff on imports in violation of the Commerce clause and the Fourteenth Amendment's Due Process and Equal Protection clauses of the United States Constitution.

STATEMENT OF THE CASE

This case was presented to the Courts below upon a stipulation of facts. (R. Item 2, pp. 9-47). The only question on appeal to this Court concerns the constitutionality of the Iowa single sales factor net income apportionment formula.

Moorman, an Illinois Corporation, was engaged, during its fiscal tax years in question, March 31, 1968 through March 31, 1972, in the business of manufacture and sale of animal feeds. Such feeds were manufactured by Moorman in five plants located in Texas, Nebraska, and Illinois and sold by Moorman salesmen in more than 30 states. During the aforementioned fiscal years, Moorman carried on substantial income producing activities in the state of Iowa. After sales of feeds were negotiated by Moorman's Iowa sales force of over 500 employees, delivery to Iowa customers was typically made from one of six warehouses operated by Moorman in Iowa. Moorman engaged in no manufacturing in Iowa and the products sold to Iowa customers were all manufactured in Illinois. For the years in question, Moorman filed Iowa income tax returns, apportioning income to Iowa upon the basis of a three factor formula, consisting of sales, property, and payroll factors, computed by it.[1] For the years in question, the Director recomputed Moorman's Iowa apportionable net income by application of the Iowa sales factor formula, rather than the three factor formula computed by Moorman. After notice and opportunity for hearing, the tax assessments which are the subject of this appeal were confirmed by the Director. (App. A, pp. A1-47--all references to the Appendix herein are to the Appendix contained in Moorman's Jurisdictional Statement).

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1. In its Jurisdictional Statement, Moorman claims to have used the three factor formula contained in the Uniform Division of Income for Tax Purposes Act. The Uniform Act does contain a three factor formula with sales, property, and payroll factors. Moorman's invocation of the Uniform Act as the source of its formula is here both an innovation and irrelevant. Innovative because it has never been suggested in this case prior to the Jurisdictional Statement. Irrelevant because the Act is not uniformly interpreted by those states which have adopted it and is certainly not binding on states, such as Iowa, which have not adopted it.

Moorman appealed the Director's determination to the Polk County District Court. The constitutional issues presented to the District Court were stipulated. (R. Item, 2, pp. 16-19).

The District Court held that the Iowa sales formula, on its face, violated the Commerce and Due Process, but not Equal Protection, clauses of the United States Constitution. (App. B, p. A40). In reaching these conclusions, the District Court stated that "no evidence beyond that in the stipulation was presented or is considered." (App. B, p. A9). The only evidence in the stipulation upon which the District Court predicated its factual findings causing it to conclude that the Iowa formula was facially unconstitutional consisted of a showing that a three factor formula as computed by Moorman would result in a lower percentage of net income apportionable to Iowa than would the Iowa single sales factor. (App. B., pp. A27-A28,A35-A36). This evidence, together with the District Court's unfounded assumption that Iowa taxed 100% of Moorman's net income from Iowa sales, caused the Court to conclude that, based upon the interplay of the Iowa and Illinois apportionment formulae only, the percentage of Moorman's 1968 net income actually taxed was 141.76% and similar conclusions were reached for the other tax years. (App. B, p. A36). The District Court was of the view that the constitutionality of the Iowa apportionment formula could be analyzed solely in terms of abstract computations of a three factor fomula and Iowa single factor formula. (App. B, pp. A27-A28, A35-A36). The District Court assumed that an apportionment formula is facially unconstitutional if it does not provide for geographical distribution of labor and capital, thus reading into the Constitution a preference for an equally weighted three factor property-sales-payroll formula to the exclusion of other formulae. [2] (App. B, pp. A32-A33). The nature of Moorman's unitary income producing activities in all states, the

2. On page 19 of its Jurisdictional Statement, Moorman adopts the District Court's Opinion as to Due Process and Interstate Commerce.

profitability of its operations in all states, the precise jurisdictional sources of Moorman's net income in all states, and Moorman's net income tax base computations in all states were simply never considered by the District Court in making its findings and conclusions. Prior constitutional apportionment precedents, with their appropriate constitutional principles, were deemed insignificant by the District Court. (App. B, p.A37). The District Court based its facial unconstitutionality holding upon *General Motors Corporation v. District of Columbia*, 380 U.S. 553 (1965), despite the fact this Court expressly noted that such case was not decided on constitutional grounds. (App. B, pp.A29, A37).

An additional Commerce Clause violation was found by the District Court based upon a hypothetical situation which assumed that the interplay between the Iowa and Illinois apportionment formulae gave the Iowa-based manufacturer a commercial advantage. (App. B, p. A38). Such a finding was inconsistent with the District Court's initial statement to only consider the evidence in the stipulation. (App. B, p. A9). As noted, infra, hypotheticals form no grounds for resolution of constitutional questions. Moreover, the conclusion here was inconsistent with the District Court's own determination that the equality of treatment of Iowa and non-Iowa corporations explained why the Iowa tax law was not in violation of the Equal Protection clause. (App. B, p. A24).

The Director appealed the District Court's decision to the Iowa Supreme Court, and Moorman cross-appealed. The Iowa Supreme Court unanimously reversed the District Court and held that the Iowa formula was facially constitutional and, further, that the formula was constitutional as applied to Moorman. (App. C, pp. A51-A89). Unlike the District Court, the Iowa Supreme Court noted that, for Due Process analysis, this Court's constitutional apportionment decisions recognize: (1) impossibility of achieving precise apportionment; (2) rough approximation is sufficient; (3) taxpayer's heavy burden in challenging apportionment formulae on constitutional grounds; and (4) the states are unrestricted in schoosing apportionment formulae and have great

leeway in making such choices. (App. C, p. A78). The Iowa Supreme Court noted that for the Iowa formula to be facially unconstitutional, it must fail to achieve constitutional standards "in every conceivable situation," but that this could not logically happen. (App. C, p. A79). The Court distinguished *General Motors Corporation v. District of Columbia*, supra, as expressly decided on nonconstitutional grounds, thus offering no precedent or support for facial invalidity of the Iowa sales formula. (App. C, pp. A76-A78). The Court noted that Moorman's evidence merely showed a larger percentage of total net income apportioned to Iowa by the Iowa single factor formula than by Moorman's computed three factor formula, but that such evidence formed no basis to infer "either double taxation or a taxation of extraterritorial values" in violation of Due Process. (App. C, p. A80).

The Due Process analysis along with the "potentially large deductions" in computation of the Iowa tax base were advanced as reasons by the Court for concluding that the Iowa formula did not facially violate the Commerce clause, the Court stating: "Clearly, a corporation in Moorman's situation is not taxed by Iowa on 100% of its income from Iowa sales." (App. C, p. A82). In essence, the Iowa Supreme Court concluded that the so-called "findings of fact" of the District Court relied upon by Moorman in its Jurisdictional Statement herein were unjustified inferences, unsupported by the evidence, and were based upon unproven assumptions and improper analysis of the constitutional principles involved. (App. C, pp. A80, A82).

The Iowa Supreme Court also determined that the Iowa sales formula did not facially violate Equal Protection, pointing out that no evidence was introduced on this issue by Moorman which only attempted to show "extreme" hypothetical situations.[3] (App. C, p. A85). Thus, it was not shown, for Equal Protection

3. This same conclusion is justified as to Moorman's argument that such hypothetical condition violates Due Process or the Commerce Clauses. Consequently, no showing has been made that the Iowa sales formula somehow subsidizes exports and penalizes imports.

purposes, that the Iowa sales formula subsidizes exports and imposes a tariff on imports.

The Court determined that the tenor of Moorman's contentions that the Iowa sales formula was unconstitutionally applied to its net income, as ordered by the Director, was inseparable from its allegations as to facial constitutionality. (App. C, p. A86). Thus, having concluded the Iowa formula was facially valid, the Court held that Moorman had not carried its burden of showing that the Iowa formula was unconstitutionally applied to it. (App. C, pp. A86-87).

ARGUMENT

Moorman asserts that the Iowa sales formula contained in § 422.33 (1)(b), Code of Iowa, violates the Fourteenth Amendment's Due Process and Equal Protection clauses and the Commerce clause of the United States Constitution. Thus, federal questions have been raised, but are they substantial? Under 28 U.S.C. § 1257(2) a federal question is not substantial if it has been settled by previous decisions of this Court. *Zucht v. King*, 260 U.S. 174 (1922).

Moorman's Jurisdictional Statement clearly discloses a two-prong approach which is: (1).The Iowa sales formula is facially unconstitutional; and (2).The Court should approve, to the exclusion of any other apportionment formula, the three factor formula as contained in the Uniform Division of Income for Tax Purposes Act. Indeed, this approach by Moorman could not be more clearly set forth than it is in pages 20-23 of its Jurisdictional Statement. And, in attempting to show that the federal questions are substantial, in pages 12-19 of its Jurisdictional Statement, Moorman eschews any pretense that this Court should consider the application of the Iowa sales formula separately from its facial constitutionality.[4] In short, Moorman

4. This approach is consistent with Moorman's contentions, as noted by the Iowa Supreme Court, that the tenor of Moorman's constitutional assertions as to application of the Iowa sales formula could not be separated from its facial constitutionality arguments. (App. C, p. A86).

not only asserts the inherent invalidity of the Iowa sales formula, but in lieu thereof, this Court should force upon the States the equally weighted three factor formula as computed in the Uniform Act, rather than leave such a choice to appropriate legislative bodies.

Against this backdrop, previous decisions of this Court resolve, upon Due Process and Commerce clause grounds, the facial constitutionality of the Iowa sales formula. These decisions clearly disclose that this Court has never struck down, on constitutional grounds, a state tax apportionment formula on its face and this Court has refrained from singling out any particular apportionment formula to the exclusion of all others. The cases show that this Court has facially upheld, upon constitutional grounds, diverse apportionment formulae in the following cases: *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920) (single property factor); *Bass, Ratcliff & Gretton Ltd. v. State Tax Commission*, 266 U.S. 271 (1924) (single assets factor); *National Leather Co. v. Massachusetts*, 277 U.S. 413 (1928) (single property factor); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. U.S. 123 (1930) (single property factor);[5] *Kent-Coffey Mfg. Co. v. Maxwell*, 291 U.S. 642 (1933) (single property factor); *Norfolk & Western Railway Co. v. North Carolina*, 297 U.S. 682 (1936) (net operating revenue formula based upon mileage factor); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939) (single gross receipts factor); *Butler Brothers v. McColgan*, 315 U.S. 501 (1942) (three factor sales-property-payroll formula); *International Harvestor Co. v. Evatt*, 329 U.S. 416 (1947) (Two factor gross receipts and property formula).

Taxpayers, in the above cases, posited arguments similar to Moorman as to facial constitutionality and, except for *Hans*

5. In *Hans Rees'*, this Court declared the North Carolina apportionment statute invalid *as applied* to the particular factual situation involved. Moorman has made no attempt to come forward with such an evidentiary showing as did the taxpayer in that case. Moorman has made no attempt to show its selling profit or manufacturing profit (if any) as did the taxpayer in *Hans Rees'*.

Rees', taxpayers' evidence in those cases was similar to Moorman's comparison of the percentages apportioned by the formula under attack and some other method. Thus, there is no reason to suggest that the instant case should be treated differently than its constitutional predecessors by this Court.

In *Underwood*, this Court stated:

> "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut, and ending with sale in other states." (254 U.S. at 120)

Consequently, it is clear that this Court has recognized sales as an income producing activity and, thus, it is proper to apportion income by the geographical distribution of sales as a matter of constitutional law. See also *Ford Motor Co. v. Beauchamp*, supra. Thus, the instant case does not present a situation where an apportionment formula is based upon matters having nothing to do with income producing activities connected with Iowa nor are peculiar circumstances present. *Norfolk & Western Railway Co. v. Missouri Tax Commission*, 390 U.S. 317 (1968).

Even in *General Motors v. District of Columbia*, 380 U.S. 553 (1965) relied upon almost exclusively by Moorman to sustain its constitutional arguments, this Court expressly noted its historical constitutional position that "the Court has refrained from attempting to define any single appropriate method of apportionment."[6] Yet, Moorman wants this Court to make such an exclusive definition. "The Constitution is not a formulary." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). Moreover, this Court in *General Motors* did not hold that the sales factor formula does not apportion net income as Moorman states in its Jurisdictional Statement.

In those cases where this Court upheld single factor formulae as well as in the three factor case of *Butler Bros*, supra, the

6. 380 U.S. at 561

Director demonstrated, without contradiction or refutation by Moorman, "the tax schemes involved therein were much more harsh than Iowa's corporate tax scheme."[7]

Thus, it is clear that the Iowa sales formula could not be facially unconstitutional since it cannot be demonstrated that such formula fails to meet constitutional standards "in every conceivable situation which might possibly arise."[8]

Finally, this Court will not consider the constitutionality of a net income apportionment scheme as an abstract proposition to resolve the constitutional issues raised in the instant Appeal. *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450, 463 (1959). "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960). This same statement would be true as to state legislation. Consequently, Moorman's attack on the constitutionality of the Iowa sales formula is inappropriate, as a matter of constitutional law, to the extent it relies upon hypothetical Iowa-based manufacturers exporting goods out of Iowa and alleged unfair competitive conditions and alleged penalties against imports. Such was the nature of Moorman's Equal Protection assertions in the Courts below, de-emphasized by Moorman upon this appeal, and such is part of Moorman's Due Process and Commerce clause contentions.

Thus, it is clear that the federal questions presented on this Appeal have been resolved by previous decisions of this Court and are not substantial. There is simply no basis for declaring the Iowa sales formula facially unconstitutional (or unconstitutional as applied on the basis of the record evidence in this case) and forcing upon all the States the three factor formula as computed under the Uniform Act. Hence, this Court should dismiss Moorman's Appeal.

7. App.C, p. A71; R.Item 3, pp. 14-19.
8. App. C, p. A79

Aside from the fact that the federal questions are not substantial, this Court should dismiss this Appeal because the Iowa Supreme Court correctly determined that the Iowa sales formula does not violate the Fourteenth Amendment's Due Process and Equal Protection clauses and Commerce clause of the United States Constitution.

The Iowa Supreme Court's analysis and resolution of the constitutional questions involved in the instant case were clearly correct whereas the District Court, upon which Moorman relies so heavily in its Jurisdictional Statement, did not follow the principles contained in the previous constitutional decisions, already cited herein, of this Court. Indeed, the District Court expressly disregarded such constitutional precedents and based its decision wholly on the nonconstitutional decision of *General Motors Corporation v. District of Columbia*, supra.[9] The following statements made by this Court are applicable to the instant Appeal and were adhered to by the Iowa Supreme Court:

> "The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It therefore adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state." *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-1.
>
> "There is no evidence in the record as to whether the company received any net income from its New York business, or the amount of the profit and loss on that business, if any, either considered separately or in connection with the manufacturing business carried on in Great Britain." *Bass, Ratcliff & Gretton Ltd. v. State Tax Commission*, 266 U.S. 271, 283 (1924)

9. App. B, p.A37.

"A finding that the statute, though fair upon its face, is oppressive toward the railway in its practical operation cannot rest upon so fragmentary and partial a showing of facts. We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence." *Norfolk & Western Railway Co. v. North Carolina*, 297 U.S. 682, 688 (1936).

"We reject petitioner's contention that constitutionality of state taxation turns on so narrow an issue as whether local assets rather than local gross receipts are used in a taxing formula." *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 335 (1939).

"The fact of the matter is that appellant has not shown the precise sources of its net income of $1,149,677. If factors which are responsible for that net income are present in other states but not present in California, they have not been revealed." *Butler Bros. v. McColgan*, 315 U.S. 501, 509 (1942).

"Furthermore, this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that 'rough approximation rather than precision' is sufficient . . . Unless a palpably disproportionate result comes from an apportionment . . . this Court has not been willing to nullify honest state efforts to make apportionments." *International Harvestor Co. v. Evatt*, 329 U.S. 416, 422 (1947).

"We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."[10] *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445.

The above constitutional precepts, consistently expounded by this Court over the years, were fully considered by the Iowa Supreme Court, but ignored by the District Court.[11] This Court has never held an apportionment formula unconstitutional for any form of state taxation, income or otherwise, upon the meager evidentiary showing presented by Moorman in the parties' stipulation. This Court's constitutional precedents require that Moorman, not the State of Iowa, come forward with evidence "clear and cogent" showing that the Iowa sales formula produced a "grossly distorted result" or an apportionment "out of all proportion to the business transacted" in Iowa.[12] Such a showing cannot be made, as a matter of constitutional law, by limiting the inquiry to a comparison of the apportionment percentages of the Iowa sales formula and Illinois three factor formula in the abstract, ignoring Moorman's income producing activities in all states, failing to consider or point out the profitability of Moorman's operations in all states, failing to point out the precise jurisdictional sources of Moorman's income in all states, failing to consider Moorman's tax bases computed for all states, assuming that an apportionment formula must give geographical consideration to capital and labor as a prerequisite for being facially valid, assuming that Moorman was taxed by the Iowa formula on 100% of its income derived from Iowa sales, and assuming by hypotheticals or hypothesis that the Iowa sales formula gives direct commercial advantages to Iowa-based companies and penalizes imports of foreign corporations. The Iowa Supreme Court clearly recognized that the District Court erred in making

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10. This statement by Justice Frankfurter is particularly apropos to the instant case where Moorman seeks a declaration of the Iowa sales formula's facial invalidity and its forced replacement by the Uniform Act's three factor formula.

11. App. C, pp. A78-A82

12. App. C, p. A79

its "findings" by recognizing such findings were not proven.[13]

In its Jurisdictional Statement, Moorman contends that the tax base is irrelevant. No real reason is given for such irrelevancy. Apportionment formulae do not operate in a vacuum and, until applied to a net income base, the percentages computed by such formulae would not disclose anything. Certainly, the tax base can be examined to determine if, as applied, a state has taxed to the extent of its constitutional authority. Moreover, the Iowa "operating incidence" of the tax in question is not on gross sales, as such, but upon *net* income. This net income figure is derived by subtracting from overall gross income various deductions, which for Iowa include a form of federal tax deduction. See § 422.35, Code of Iowa. Such deductions consist of expenses incurred in Iowa and other states by a unitary multistate business. Consequently, the tax base does have a bearing on whether Iowa did, in fact, tax 100% of Moorman's income derived from its Iowa sales. When the constitutional principles previously discussed herein together with the tax base are considered, it is clear that the Iowa

13. App C, pp. A78-A82. In its Jurisdictional Statement, Moorman contends that the Iowa Supreme Court made no direct response to the findings of the District Court. In constitutional apportionment cases, the Courts are only required to determine whether a taxpayer has proved the invalidity of the formula. The Iowa Supreme Court did hold that Moorman's evidence did not prove multiple or extraterritorial taxation of its net income by Iowa which, for example, the District Court found was 141.76% for 1968. (App. B, p. A36; App C, pp. A79-A80). It should also be pointed out that this 141.76% figure was based upon the *abstract* interplay between the Iowa and Illinois apportionment formulae where it was assumed that Moorman was taxed by Iowa on 100% of its income from Iowa sales which the Iowa Supreme Court found to be erroneous – a direct response to the District Court's findings. (App. C, p. A82). Indeed, for 1968, the abstract interplay between the Iowa and Illinois apportionment formulae only showed that Iowa taxed 21.88% of Moorman's income and Illinois taxed 41.76% of such income. (R. Item 2, p. 28; R. Item 6, p. 17) Of course, these figures do not take into account such matters as net income base, profitability of operations in both states, and Moorman's precise jurisdictional sources of income in more than 30 states it did business in. The point is that the evidence in the stipulation does not, in any aspect viewed, disclose that the Iowa formula is unconstitutional as alleged by Moorman.

Supreme Court was correct in determining that Moorman was not taxed on 100% of its income derived from Iowa sales.

Moorman, in its Jurisdictional Statement, relies upon *General Motors Corporation v. District of Columbia*, supra, as, in effect, reasoning that an income tax apportionment formula based upon sales alone is facially unconstitutional. However, a close reading of that case clearly discloses that this Court rendered its decision "without reaching the constitutional questions raised."[14] Consequently, as the Iowa Supreme Court pointed out, "language used in such a decision does not afford a satisfactory basis for determining a state statute unconstitutional on its face."[15] Thus, this Court's criticism of a single sales factor formula offers no support for finding such a formula facially invalid, where such criticism is within the context of interpreting a statute, in view of the constitutional principles which this Court would have had to consider *if* it had based its decision on constitutional grounds. These constitutional principles which would have been considered in *General Motors*, but which were not, would include those considered by the Iowa Supreme Court as set forth in the previous decisions of this Court.[16] When those principles are considered, it is clear that Moorman, upon this appeal, could not demonstrate either the facial invalidity of the Iowa sales formula or any invalidity as applied to it. Moreover, it is clear that this Court's decision in *General Motors* as described by the Iowa Supreme Court turned on "the Court's interpretation of this statutory phrase -- which has no analogue in the Iowa statute and can scarcely be found in the due process clause."[17] Consequently, this Court never determined that the sales formula in *General Motors*, in fact, produced a "grossly distorted result", an apportionment "out of all proportion to the business transacted," or unreasonable multiple state taxation — the constitutional standards of invalidity. And, this Court, in *General*

14. 380 U.S. at 555
15. App. C, p. A77.
16. App. C, pp. A77-A82
17. App. C, p. A78

Motors never intimated that hypotheticals could be used to demonstrate unconstitutionality of apportionment formulae.

Moorman, in its Jurisdictional Statement, contends that the Iowa Supreme Court misapplied Justice Frankfurter's oft repeated phrase from *Wisconsin v. J. C. Penney Co.*, supra, 311 U.S. at 444. (App. C, pp. A78-A79). However, the Iowa Court did not, as Moorman contends, conclude that an apportionment formula is fair merely because Moorman is taxable. What the Iowa Court actually held, upon Due Process grounds, was that the fiscal policy of the State of Iowa as expressed by the Iowa sales apportionment formula was rationally related to Due Process principles applicable to determine the facial constitutionality of such formulae in as much as "the taxing power exerted by this statute bears fiscal relation to the protection, opportunities and benefits given by the state."[18] Indeed, this Due Process standard was cited by this Court in the apportionment case of *Norfolk & Western Railway Co. v. Missouri Tax Commission*, supra, 390 U.S. at 325 (footnote 5) wherein the particular apportionment formula involved was facially declared valid, but was stricken as applied to the peculiar factual circumstances proven by the taxpayer and not rebutted by the State.

Recent decisions of this Court continue a trend of allowing the states great leeway in their taxation of interstate commerce. *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975); *Complete Auto Transit, Inc. v. Brady*, 97 S. Ct. 1076 (1977). The acceptance of Moorman's position in the instant Appeal would reverse such trend and create a new doctrine of constitutional law, inhibiting without justification the states in the exercise of their fundamental power of taxation.

In attempting to show that the federal questions raised are "substantial as a matter of public importance", Moorman in its Jurisdictional statement sets forth "dire consequences" to the

18. App. C, p. A79

effect that the decision of the Iowa Supreme Court will destroy the "free trade" in this country and that Iowa, along with other states which have adopted unequally weighted three factor formulae, have shifted tax burdens to "foreigners." The Director does not agree with these sentiments expressed by Moorman. Moreover, there is no basis for the conclusion that the decision of the Iowa Supreme Court will destroy, in essence, the economy of this country or inhibit competition.[19] The fact of the matter is that Moorman has simply raised a political, not constitutional, question. In this regard, it is not irrelevant to note that Congress, in which the Commerce power is placed by the Constitution, has frequently addressed the question of providing for a uniform net income tax apportionment formula and each time has refused to impose upon the States the straitjacket demanded by corporations and others who are unable to find in the United States Constitution any provision to support the exclusivity of the formulae they espouse. See, *e.g.* S. 1245, 93rd Cong. 1st Sess. (1973); H. R. 1538, 92nd Cong., 1st Sess. (1971); H. R. 669, 95th Cong. 1st Sess. (1977).

The aforementioned arguments in support of facial constitutionality of the Iowa sales factor formula are also herein adopted for purposes of supporting the constitutionality of the Iowa sales formula as applied to Moorman's net income.

19. In *Kent-Coffey*, the apportionment scheme upheld apportioned 99.2% of taxpayer's net income to the taxing state. In *Underwood*, 47% of taxpayer's net income was apportioned to the taxing state and the apportionment scheme was upheld. There is no evidence that this Court's decisions in those cases somehow led to unfair competition and barriers to interstate commerce. Further, this Court has over the years upheld diverse apportionment formulae which results have not created an unhealthy national economy.

CONCLUSION

The Director respectfully requests this Court to sustain his Motion to Dismiss since this appeal does not present substantial federal questions for the reason that the questions sought to be raised have been resolved by previous constitutional decisions of this Court. In addition, it is submitted that the Iowa Supreme Court correctly determined, by application of the appropriate constitutional principles consistently expounded by this Court, that the Iowa sales formula for apportioning net income to Iowa is facially constitutional and constitutional as applied to Moorman's net income for the years in question.

Respectfully submitted,

RICHARD C. TURNER
ATTORNEY GENERAL OF IOWA

HARRY M. GRIGER
ASSISTANT ATTORNEY GENERAL
LUCAS STATE OFFICE BUILDING
DES MOINES, IOWA 50319

Attorneys for Appellee

PROOF OF SERVICE

STATE OF IOWA, POLK COUNTY, SS:

I, Harry M. Griger, being first duly sworn, do on oath say that I served printed copies of the foregoing Motion to Dismiss on the 19th day of October, 1977, by depositing the same in the United States mails, with first class postage prepaid, addressed to the following named persons at the addresses shown:

40 copies to — The Hon. Michael Rodal, Jr.
Clerk, Supreme Court of the United States
Supreme Court Building —
No. 1 First Street, N.E.
Washington, D. C. 20543;

3 copies to — Donald K. Barnes
26 Palm Club
Pompano Beach, Florida 33062
Counsel for Appellant

3 copies to — Walter R. Brown
John V. Donnelly
1200 Register & Tribune Building
Des Moines, Iowa 50309
Counsel for Appellant

Harry M Griger
HARRY M. GRIGER
ASSISTANT ATTORNEY GENERAL
LUCAS STATE OFFICE BUILDING
DES MOINES, IOWA 50319

Subscribed and sworn to before me at Des Moines, Iowa by Harry M. Griger, this 19th day of October, 1977.

Jessy J. Metcalf
Notary Public, State of Iowa